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"Constitutional Challenges to Section 152 of the Bharatiya Nyaya Sanhita, 2023: Sedition, Democratic Dissent and the Future of Free Speech in India"

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Abstract:-

Section 152 BNS, 2023, or the purported colonization of the sedition law, has brought about a recent surge of constitutional cases pushing the boundaries of freedom of expression in the digital, polarized and populist Indian democracy. The "repackaged" nature and the increased breadth of its powers are reflected in Supreme Court notices issued in August 2025, across various petitions – including those filed by journalists and retired military officers. This paper builds upon current scholarship by incorporating data from the enforcement of the post-2024 regime, the shifting landscape of proportionality jurisprudence under Article 19, the chilling effects research, and international cases on "imminent harm." It has stated that the section is vague and broad and does not meet the constitutional requirement of showing "manifest arbitrariness" provided by Article 14 or "substantive due process guaranteed" under Article 21 of the Constitution, thereby potentially infringing upon the basic structure of the Constitution. The framework along with legislations argue that there is a need to go beyond the 'clear and present danger' framework by creating a new 'clear and present danger plus' one, which can be contextualised for India.

I. New Empirical Insights into the Post-Reform Enforcement Patterns (2024-2026):-

Neither in the previous few decades nor in the last few years has the Section 152 been used in the same manner as pre-2022 sedition cases. Digital journalism — which includes The Wire editor Siddharth Varadarajan in Assam — has been a subject of FIRs; academic debates that question the federalism building; social media comments on regional autonomy. However, interventions by the Supreme Court in the month of August-September 2025 on challenges to the proposed provisions provided interim reliefs; it came out clearly in these interventions that the Commission's apprehensions faced the question of "potentiality of abuse" and tagging challenges with the lingering Vombatkere batch.

Section 152's use of "financial means," "electronic communication" and "subversive activities" has helped to investigate how advocacy groups are funded and how their message is amplified through the internet, whereas Section 124A used to be limited to probing for "disaffection. There is an argument for an increase in the frequency of Article 14 allegations when the election approaches, especially in border states, as evidenced by the 2025-2026 data regarding reported cases, especially in areas where selective enforcement is a concern. Many jurisdictions do not comply with the recommendations from the Law Commission Report No. 279 (2023) for preliminary inquiries and prior sanction, which further increase procedural weaknesses.

The new provision does not just mirror but intensifies reach in the algorithmic world as "encouraging separatist feelings" might be illustrated via retweeting or hyperlinks without incitation.

II. The two writings, one by text and the other by structure, represent a visionary advance in doctrinal innovation in Section 152:- Certain "improvements" have been introduced in Section 152's "purposely or knowingly" and Explanation, the latter of which promises to prevent "lawful disapprobation," but core terms are left undefined, bringing about over-breadth. Unlike IPC 124A's narrowly drawn term of "tendency to public disorder," BNS 152 plainly requires a financial or electronic attempt to excite secession or armed rebellion to amount to inciting to or promoting armed rebellion.Unlike IPC 124A which requires a tendency to public disorder, the phrase "inciting to or promoting an armed rebellion" in BNS 152 is stylistically more commonly understood to cover financial or electronic attempts to excite secession or armed rebellion.

The form that this adopted is a variant of what is known as the "Kedar Nath" compromise: Sovereignty is prioritized first while Explanation is given a weak defense. Further, in digital spaces, the “visible representation” or “otherwise” clause will open up the doors to algorithmic recommendations and potentially memes or AI-generated content, creating new Article 19(1)(a) difficulties not seen in the jurisprudence of 1962.

III. In the times since the Puttaswamy case, one of the most debated and controversial concepts in the Constitution is the one of 'proportionality' along with that of 'arbitrariness':-

The operation of Section 152 requires strict proportionality, especially in the wake of the decisions of both Justice K.S. Puttaswamy (2017) and Shreya Singhal. While legitimate aim (sovereignty) is accepted, there is an overlap in statutes such as UAPA Sections 13, 15 and 39 already dealing with the definition of terrorist acts and support, and setting higher evident standards, rational nexus and necessity have been weakened. Disproportionate harm exists as there is less discouraging of expression through provisions on anti-terrorism than through provisions on speech-related acts of violence.

They are found to be the absence of any preliminary inquiry and the broad delegation of standard-less power to the executive action in the light of the doctrine of ‘manifest arbitrariness' on which the provision is based in the Navtej Singh Johar and Shayara Bano cases. Familiar with 2025 High Court observations (e.g. Rajasthan) regarding "genesis" in 124A to affirm substantive equivalence in spite of nominal repeal of Section 152.

The issue with Article 21 invocation is that it may lead to “media trials” or indefinite arrests, and is in contravention of the guidelines of the Arnesh Kumar (2014) and Satender Kumar Antil (2013) cases, particularly when the offence is not of a violent nature.

IV. Divines and Win's ascendancy to the Supreme Court; justices of 2025-2016:-

The Section 152 bypasses the 2022 abeyance order, says Petitions by retired Major General S.G. Vombatkere (extended to BNS) and Foundation for Independent Journalism. Supreme Court benches summoned (August 2025), raised questions about the possibility of abuse, and invited guidelines like those under Kedar Nath, for the digital world today.

Possible advanced outcomes:-

- Hybrid invalidation: Strikes ambiguous terms yet maintains basic incitement bans.

-A procedural overlay: Require the preliminary inquiry under Section 173 BNSS and Central/State sanction and judicial oversight prior to cognizance.

-In adopting “clear, present, imminent” test with “Brandon” elements along with Indian public order nuances.

-Respect might otherwise perpetuate executive power, to the detriment of the basic structure review.

V. Lessons from Abolition and Strict Scrutiny - V. Comparative Constitutionalism:-

US Brandenburg v Ohio (1969) requires intention + likely of imminent lawless action. Abstract advocacy, revolutionary separatism is still protected. This could be leveraged in this context for their OSL 2025 challenges which will be sans the 'bad tendency' test.

In the UK, the abolition of sedition (2009) was rather indicating an obsolescence of mature democracies, while the other offenses, such as those under the Terrorism Act 2006, still demand a particular glorification with intent. This evolution is not followed by India's wide-ranging provisions.

The necessity and proportionality criteria are key in democracies to the ICCPR/ECHR/ Article 19(3) and to the European Court of Human Rights jurisprudence. UN Special Rapporteurs have identified sedition analogues that target minority voices, journalism. The financial/electronic clauses in Section 152 are liable to breach the protections of "regardless of frontiers".

Over-breadth claims are supported by interdisciplinary research, such as self-censorship surveys showing diabetes in India, revealing measurable adverse effects on democracy and freedom of speech since 2024, as demonstrated by behavioral economics analysis.

VI. Normative and Theoretical Framework: Deliberative Democracy Under Threat:-From a Rawlsian or Habermasian perspective, Section 152 undermines the public sphere essential for constitutional legitimacy. Criminalizing "separatist feelings" or ideological encouragement prioritizes outcome-based unity over process-based contestation, risking majoritarian authoritarianism. In India's pluralistic federalism, this threatens Article 1's "Union of States" by equating regional aspirations with subversion.

Original contribution:- Propose a "democratic harm" threshold—punishable only where speech foreseeable causes tangible disruption to constitutional order, evidenced by material acts beyond expression.

VII. Policy and Judicial Recommendations:-

1. Judicial: Issue detailed guidelines based on D.K Basu; incorporate AI/Digital Evidence guidelines; review and re-impose Kedar Nath framework of Proportionality.

2. Legislative, Reduce punishment slabs, Incorporate "actual incitement" mens rea and Implement Law Commission sanction mechanism.

3. Institutional: Independent oversight body for speech related FIRs, data transparency dashboards on use of BNS 152.

4. International Alignment: keep abuzz with ICCPR reporting and fortify international democratic profile.

The changes would turn Section 152 into a quite specific security tool.

Conclusion: Shaping Constitutional Identity:-

In Section 152 BNS, there is a conflict between decolonization politics and security enforcement. The opportunity is ripe with the 2025 Supreme Court hearing to be the moment we remind everyone that dissent is the bedrock of constitutional democracy, and that it is neither evil nor an enemy. Such an interpretation, narrow and enhanced with strong process, would be in keeping with the intent of the framers, the spirit of 'Kedar Nath' and changing international norms. The failure risk is to make ideology acceptable as a policing system and to extend the democratic exceptional of India to achieve an exceptional status for Indians.Failure would result in the normalization of ideological policing and lessens Indian exceptionalism as a democracy. The court's decision will reverberate for generations because the factions, competing compendiums and future generations whose voices make up the chorus of freedom of speech.

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Thanks